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MANUAL

ON

LIMITATIONS OF ESTATES

IN SOUTH CAROLINA,

BY

THOMAS S. MOORMAN.

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ON

LIMITATIONS OF ESTATES

IN

SOUTH CAROLINA,

BY

THOMAS S. MOORMAN, ESQ.

COLUMBIA, S. C.:
THE BRYAN PRINTING COMPANY,
1889.

THIS PAMPHLET is simply intended to be a convenient and reliable statement of the rules and principles upon "Limitations of Estates," with their modifications and exceptions, as recognized or decided by the highest Courts of South Carolina.

ERRATA.

Page 27.—2nd line. The last word "*live*" should be "*lives.*"

Page 27.—Section 4, Subdivision 4, third line. The word "*taken*" should be "*taking.*"

Page 29.—Remoteness: Insert, in first line after word "*within*", the words "*a life or lives in being and.*"

Page 42.—Subdivision 5. The word "*time*" in 2nd line should be "*line.*"

On page 39, Subdivision 3, and on page 46, Subdivision 2. It should be added, as to the case of Danner vs. Trescott, as added on page 13, that the distinction made therein between personalty and realty, was not recognized in the later case of McIntyre vs. McIntyre, which held that realty, as well as personality, was subject to the stated qualification of the rule considered.

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CONSTRUCTION.

I. GENERALLY.

1. One general, cardinal principle, clearly established, is that, in the construction of instruments, the *obvious intention shall prevail*, provided it is not inconsistent with settled rules of law.

Guery vs. Vernon, 1 N. & McC., 71.
Hall vs. Goodwyn, 2 N. & McC., 384.
Carr vs. Porter, 1 McC. Ch., 86.
Bedon vs. Bedon, 2 Bail. L., 247.
Henry vs. Stewart, 2 Hill. L., 241.
Seabrook vs. Seabrook, McM. Eq., 204.
McAllister vs. Tate, 11 Rich. L., 514.
Perry vs. Logan, 5 Rich. Eq., 211.
Lowry vs. Muldrow, 8 Rich. Eq., 246.
Seabrook vs. Gregg, 3 S. C., 77.
Duncan vs. Harper, 4 S. C., 83.
Simmons vs. Bryce, 10 S. C., 363.
Faber vs. Police, 10 S. C., 386.
Scaife vs. Thompson, 15 S. C., 337.
Bannister vs. Bull, 16 S. C., 227.
McIntyre vs. McIntyre, 16 S. C., 293.
McCreery vs. Burns, 17 S. C., 49.
Pratt vs. McGehee, 17 S. C., 434.
Canedy vs. Jones, 19 S. C., 307.
Clark vs. Clark, 19 S. C., 349.
Lorick & Lowrance vs. McCreery, 20 S. C., 428.
McCown vs. King, 23 S. C., 235.
Reames vs. Spann, 25 S. C., 564.
McGehee vs. Hall, 26 S. C., 181.
Roundtree vs. Roundtree, 26 S. C., 462.
Jaudon vs. Ducker, 27 S. C., 297.
Mellichamp vs. Mellichamp, 28 S. C., 129.
Howze vs. Barber, 29 S. C., 470.

But the intention sought must be "in regard to the effect, rather than the mode of producing it."

Lorick & Lowrance vs. McCreery, 20 S. C., 428.

2. Generally, the intention must first be gathered from *the language of the instrument alone*, irrespective of matters extrinsic.

Taveau vs. Ball, 1 McC. Ch., 9.
Carr vs. Porter, 1 McC. Ch., 72.
Halbrook vs. Gailliard, Riley Eq., 177.
Canedy vs. Jones, 19 S. C., 300.
Mellichamp vs. Mellichamp, 28 S. C., 129.
Blount vs. Walker, 28 S. C., 545.
Howze vs. Barber, 29 S. C., 470.

But from the *whole* instrument, without giving preference to any particular part and to give effect to every part, if possible.

Myers vs. Myers, 2 McC. Ch., 484.
Henry vs. Archer, Ball Eq., 547.
Smith vs. Hilliard, 2 Strob. Eq., 222.
Corbet vs. Laurens, 5 Rich. Eq., 322.
Carson vs. Kennerly, 8 Rich. Eq., 267.
Scaife vs. Thompson, 15 S. C., 357.
Canedy vs. Jones, 19 S. C., 301.
Lorick & Lowrance vs. McCreery, 20 S. C., 428.
McCown vs. King, 23 S. C., 236.
Roundtree vs. Roundtree, 26, S. C., 463.
Howze vs. Barber, 29 S. C., 470.
Durant vs. Nash, 30 S. C., 188.

3. If the language is *doubtful*, it may be read with most extreme caution *in the light of present, surrounding circumstances*, guided by such rules of law as experience has shown to be useful in ascertaining the intention; and such circumstances may be proved by parol.

Holbrook vs. Gailliard, Riley Eq., 169.
McCall vs. McCall, 4 Rich. Eq., 455.
Schoppert vs. Gillam, 6 Rich. Eq., 35.
Addison vs. Addison, 9 Rich. Eq., 66.
Scaife vs. Thompson, 15 S. C., 357.
Bell vs. Towell, 18 S. C., 101.
Clark vs. Clark, 19 S. C., 348.
Reams vs. Spann, 25 S. C., 564.

Jaudon vs. Ducker, 27 S. C., 297.
Durant vs. Nash, 30 S. C., 188.

But the evidence of such circumstances is allowed *only* to explain what the party *has* written and not what *he intended to write*—not to show intentions not expressed in the instrument.

Holbrook vs. Gailliard, Riley Eq., 178.
McCall vs. McCall, 4 Rich. Eq., 456.
Scaife vs. Thompson, 15 S. C., 357.
Cunningham vs. Cunningham, 20 S. C., 330.

And in *wills*, we may look, also, *to subsequent events;* but with much caution.

Schoppert vs. Gillam, 6 Rich. Eq., 35.
Addison vs. Addison, 9 Rich. Eq., 66.

Yet, when the will is plain, unequivocal, and in technical law language, there is no necessity to resort to this rule.

Carr vs. Jeannerett, 1 McC. L., 49.

4. *Technical words* are presumed to be used in their strictly *primary technical meaning;* and must be so construed, unless *context clearly shows* they were used in a different sense, when they will be given the sense intended, and the intention will prevail. Courts will not depart from *technical* construction to effect an intention *conjectured from circumstances.*

Williams vs. Foster, 3 Hill. L., 194.
Seabrook vs. Seabrook, McM. Eq., 206.
Smith vs. Hilliard, 2 Strob. Eq., 221.
Clark vs. Mosely, 1 Rich. Eq., 400.
McClure vs. Young, 3 Rich. Eq., 574.
Seabrook vs. Gregg, 3 S. C., 77.
Swann vs. Poag, 4 S. C., 18.
Duncan vs. Harper, 4 S. C., 83.
Renwick vs. Smith, 11 S. C., 306.
Pratt vs. McGehee, 17 S. C., 434.

So, also, certain forms of expression used by testator have been placed upon same grounds *as technical* words, and must have their *primary* meaning, unless corrected by rules applicable to technical words.

Renwick vs. Smith, 11 S. C., 306.

5. And ordinary words must be taken in their usual sense.

Blount vs. Walker, 28 S. C., 545.

6. When intention is ascertained, other words *repugnant* to those showing the intention must be *struck out*, or so *restrained* in their application as to effect intention.

Adams vs. Chapline, 1 Hill. Ch., 265.

McAllister vs. Tate, 11 Rich. L., 514.
Edwards vs. Edwards, 2 Strob. Eq., 101.
Duncan vs. Harper, 4 S. C., 83.
Allen vs. Vogler, 6 S. C., 58.
Moore vs. Sanders, 15 S. C., 442.
Ex parte Yown, 17 S. C., 536.

Or other words may be *supplied* in a will, when absolutely necessary to make the context sensible.

Clark vs. Clark, 19 S. C., 351.

Or words of will or deed may be *transposed*, to carry out intention and give full operation and consistency to the context.

O'Neall vs. Boozer, 4 Rich. Eq., 22.
McCown vs. King, 23 S. C., 235.

The word *hereinafter* must be read *hereinbefore*.

Creighton vs. Pringle, 3 S. C., 95.

The word "and," may be changed to "or."

Seabrook vs. Mikell, Chev. Eq., 90.

And the word "or" may be changed to "and."

Monroe & Morgan vs. Holmes, 1 Brev., 248.
Bostick vs. Lawton, 1 Spear. L., 240.
Shands vs. Rogers, 7 Rich. Eq., 425.
Massey vs. Davenport, 23 S. C., 455.

Nor can intention *of* testator be defeated by literal construction of particular or subsequent paragraph of a will.

Shands vs. Rogers, 7 Rich. Eq., 425.
Massey vs. Davenport, 23 S. C., 455.

7. Settled rule of construction, that Courts will give effect to the lawful dispositions of a testator, although some portions of his disposition may be invalid by some rule of law.

Lowry vs. Muldrow, 8 Rich. Eq., 246.

8. An estate may be created, enlarged, controlled, and even destroyed by *implication;* but nothing is to be *implied*, which is not necessary to effect intention and does not arise fromthe face of the written instrument, and not *then, when* the intention can

otherwise be carried out, and implication is not necessary.

Carr vs. Porter, 1 McC. Ch., 77.

Taveau and wife vs. Ball, 1 McC. Ch., 10.

Smith vs. Hilliard, 2 Strob. Eq., 222.

Implication allowed to contradict an express estate; though in some earlier cases it was held differently.

Addison vs. Addison, 9 Rich. Eq., 63.

But not to make *issue* purchasers.

Carr vs. Porter, 1 McC. Ch., 86.

And is stronger in favor of an heir than a purchaser.

9. Courts, in interpreting instruments of gift, seek to avoid disinheriting the issue of the donee, and give such construction only when compelled by established rules and principles.

Evans vs. Godbold, 6 Rich. Eq., 26.

10. Legacy, in General Statutes, Section 1865, is used in technical sense, and does not include *devise*.

Pratt vs. McGehee, 17 S. C., 432.

But this Section has since been so amended as expressly to include any devise of real estate.

18 Stat. at Large, 325.

II. AS TO REALTY AND PERSONALTY.

1. The wide distinction heretofore existing between *realty* and *personalty*, as to limitations in instruments, by which transferred or conveyed, has grown less, *until now the rules of construction of limitations* as to the two are *generally the same*.

Mendenhall vs. Mower, 16 S. C., 309.

2. Yet Courts are not as strictly bound down to artificial rules of construction in personal as in real estate, and are more ready to construe against *remoteness* in former than in latter.

Brummet vs. Barber, 2 Hill. L., 220.

3. And words which would be sufficient to tie down a limitation over, of *personalty* to the death of the first taker, are sometimes insufficient to produce that effect as to *realty*.

The distinction arises from the facts, that *real* estate is *descendible*, and *personal* estate is *not* and *cannot* be made *inheritable* by any words you can employ. So that the issue or heirs of

the body are only enabled to take in personalty, as intended, by allowing such limitation over to convert them into *purchasers in remainder*, while the direct gifts to them in *realty* is unaffected by the limitation.

Mazyck vs. Vanderhorst, Bail. Eq., 49.
Henry vs. Archer, Bail. Eq., 566.
Whitworth vs. Stuckey, 1 Rich. Eq., 413.
Henry vs. Means, 2 Hill L., 328.
Carr vs. Porter, 1 McC. Ch., 83.
Hay vs. Hay, 3 Rich. Eq., 390.

As when personalty and realty are given over in the same clause upon death of the first taker, *without leaving issue*, the gift over of the *personalty* is *supported*, while that of the *realty fails*.

Mazyck vs. Vanderhorst, Bail. Eq., 50.
Perry vs. Logan, 5 Rich. Eq., 215.
McCorkle vs. Block, 7 Rich. Eq., 411.
Lowry vs. Muldrow, 8 Rich. Eq., 247.

But no such distinction exists where such limitation over is to the *survivors* of the first takers *as a personal benefit*.

DeTreville vs. Ellis, Bail. Eq., 37.
Stevens vs. Patterson, Bail. Eq., 41.
Mathis vs. Hammond, 6 Rich. Eq., 381.
McCorkle vs. Block, 7 Rich. Eq., 421.

4. When real estate is ordered to be sold and proceeds disposed of, the limitation shall be construed as of personalty.

Perry vs. Logan, 5 Rich. Eq., 215.
Farr vs. Gilreath, 23 S. C., 513.

5. And personalty may be limited over upon first takers dying *without children*.

DeTreville vs. Ellis, Bail. Eq., 40.
Cordes vs. Adrian, 1 Hill. Ch., 154.
Henderson vs. Kinard, 29 S. C., 17.

See: Fee Conditional.
Remoteness.

III. AS TO DEEDS AND WILLS.

1. *In wills*, greater latitute is allowed in seeking intention of

testator; while as to construction of *deeds*, one of the rules is that the terms must be taken most strongly against the grantor.

Ex parte Yown, 17 S. C., 536.

2. But this rule as to *deeds* is subservient to the rule that intention must govern.

Altman vs. McBryde, 4 Strob., 208.

3. And indulgence to wills, allowing executory devises and untechnical words to carry a fee, is denied to deeds.

Bowman vs. Lobe, 14 Rich. Eq., 227.

4. By the Act 1824, General Statutes, Section 1861, words of limitation were no longer necessary to convey an estate in fee simple by devise.

5. One difference between limitations in a *deed* and *will* is, that by *will* a fee may be limited after a fee, but it cannot be so limited by *deed*.

Mendenhall vs. Mower, 16 S. C., 310.

6. "Legatee" in a deed meant a party having an interest in an intestate estate—a distributee.

Lorick & Lowrance vs. McCreery, 20 S. C., 428.

THE RULE IN SHELLEY'S CASE.

1. This has been an admitted and established *rule of law* for centuries, and its wisdom is more approved as it is better understood.

Williams vs. Foster, 3 Hill. L., 184.

Banister vs. Bull, 16 S. C., 228.

2. The rule is, that where an estate of freehold, legal or equitable, is limited by deed or will or other writing to a person, and the same instrument contains a limitation by way of remainder of the *same* legal or equitable character, either mediate or immediate, with or without the interposition of another estate, *to his heirs, his issue or the heirs of his body*, as a class of persons to take in succession from generation to generation, the word *heirs* or issue is a word of limitation *i. e.*—the ancestor takes the *whole estate* comprised in this term. Thus, if the limitation be to the *heirs of his body*, he takes a *fee conditional;* if to his *heirs* general, a *fee simple.*

Carr vs. Porter, 1 McC. Ch., 83.

Hull vs. Hull, 2 Strob. Eq., 190.
Porter vs. Doby, 2 Rich. Eq., 52.

So, if an estate of freehold be given to the ancestor and a remainder be thereon limited to his *heirs, or* to the *heirs of his body,* such remainder is immediately executed in possession in the ancestor so taking the freehold, and he takes an estate in fee, or in tail, or fee conditional, according to the terms of the limitation.

Williams vs. Foster, 3 Hill L., 194.

But the rule only applies where the limitation over is to *issue or heirs of the body.*

Bannister vs. Bull, 16 S. C., 227.

3. But the rule may be controlled by the *manifest intention* of the testator or grantor, where it appears upon the face of the instrument: 1. That he meant to confine the first taker to an estate for life; and, 2. That he meant to effectuate that intention by some clear and intelligent expression of a design to have the issue, heirs, or heirs of his body, take by *purchase* and *not by descent.*

Dott vs. Wilson, 1 Bay, 452.
Lemacks vs. Glover, 1 Rich. Eq., 141.
Myers vs. Anderson, 1 Strob. Eq., 346.
Whitworth vs. Stuckey, 1 Rich. Eq., 404.
McClure vs. Young, 3 Rich. Eq., 576.
McIntyre vs. McIntyre, 16 S. C., 297.

So, the authorities conclusively show that *when* the words heirs, heirs of the body, or issue, are *so qualified* by additional words as to evince an *intention* that they are *not* to be taken as descriptive of an *indefinite line of descent,* but *are used to indicate a new stock of inheritance, the rule does not apply.*

Henry vs. Archer, Bail. Eq., 536.
Myers vs. Anderson, 1 Strob. Eq., 344.
Templeton vs. Walker, 3 Rich. Eq., 541.
McClure vs. Young, 3 Rich. Eq., 576.
Cox vs. Buck, 5 Rich. L., 605.
Evans vs. Godbold, 6 Rich. Eq., 26.
Fields vs. Watson, 23 S. C., 46.
McCown vs. King, 23 S. C., 236.

As where the words *and to their heirs* are added, they *so*

qualify and the remaindermen take *as purchasers.*

Spearman vs. Angel. Bail. Eq., 351.
Dott vs. Cunningham. 1 Bail. L., 455.
Lemrick vs. Glover, 1 Rich. Eq., 143.
McClure vs. Young, 3 Rich. Eq., 576.
McIntyre vs. McIntyre, 16 S. C., 294.

And, as where the limitation is to such remaindermen as tenants in common, or to be equally divided between them.

Henry vs. Means, 2 Hill. L., 328.
Henry vs. Archer, Bail. Eq., 534.
McClure vs. Young, 3 Rich. Eq., 576.
Myers vs. Anderson, 1 Strob. Eq., 344.
Nix vs. Ray, 5 Rich. Eq , 425.

Or, is of such a quality, or be given to be enjoyed in a way incompatible with the idea that the remaindermen are to hold the estate in indefinite succession.

Myers vs. Anderson, 1 Strob. Eq., 344.
McClure vs. Young, 3 Rich. Eq., 576.

The case of Danner vs. Trescot, 5 Rich. Eq., 362, does hold that the foregoing *qualification,* by the addition of the words "and to their heirs," is too broadly laid down and applies only to *personal* estate and *not* to *real* estate. But the cases above cited, which were decided *subsequently* to that case, concerned *real* estate and affirmed the older cases cited.

It may be that Danner vs. Trescot was distinguished from the older cases, on *the ground* stated by the Circuit's decree, that the limitation there was to the *heirs general and their heirs;* and it seems to be authority to modify *this* qualification as stated to that extent.

4. And yet, if the property be given to the ancestor *for life only,* but the enjoyment of it be given to the heirs or issue, in the same manner and to the same extent, precisely, as if they took by hereditary succession, they shall *not take as purchasers,* but by *inheritance,* and the *whole estate* shall vest in the ancestor.

Porter vs. Doby, 2 Rich. Eq., 52.
Bannister vs. Bull, 16 S. C., 228.

5. And the rule applies to equitable as well as legal estates, but *only* where the estate of the ancestor and that limited to their heirs or issue are of the *same quality;* that is, *both* are

equitable or *both* legal. It does not apply where one is equitable and the other legal, because they can not coalesce.

Holbrook vs. Gaillard, Riley Eq., 179.
Hull vs. Hull, 2 Strob. Eq., 190.
Austin vs. Payne, 8 Rich. Eq., 10.
Bannister vs. Bull, 16 S. C., 228.
Burnett vs. Burnett, 17 S. C., 550.

6. The rule has no relation to *personalty.*

Austin vs. Payne, 8 Rich. Eq., 10.

7. It seems that the rule has not been abrogated by the Act of 1853.

Fields vs. Watson, 23 S. C., 51.

See Trusts, 4.

ESTATES.

TRUSTS.

1. The Statute 27 Henry VIII, General Statutes, Chap. 68, as a general rule, executes the use and transmits the legal title to the *cestui que trust*, where land is conveyed to one for the use of another or in trust for the use of another, and the person to whom the conveyance is made (the trustee) has no duties to perform or where there is nothing for him to do, requiring that the legal estate shall remain in him, in order to enable him to do what is required.

Ramsay vs. Marsh, 2 McC., 252.
Posey vs. Cook, 1 Hill L., 267.
Jenny vs. Laurens, 1 Spears. 341.
Wilson vs. Pyson, 1 Spears L., 317.
Pearce vs. McClenaghan, 5 Rich. L, 187.
McCaw vs. Galbraith, 7 Rich. L., 80.
Porter vs. Doby, 2 Rich. Eq., 53.
McNish vs. Guerard, 4 Strob. Eq, 66.
Faber vs. Police, 10 S. C., 389.
Bouknight vs. Epting, 11 S. C., 75.
Farrow vs. Farrow, 12 S. C., 172.
Bristow vs. McCall, 16 S. C., 548.
Howard vs. Henderson, 18 S. C., 189.
Leroy vs. Charleston, 20 S. C., 77.
Farr vs. Gilreath, 23 S. C., 512.
Smith vs. Smith, 24 S. C., 313.
Wieters vs. Timmons, 25 S. C., 493.

2. But it will not execute the use "where the purpose of creating would be defeated by the execution, as in cases of trusts for married women or to preserve contingent remainders, or where the trustee has some discretion to be exercised in relation to the estate or the manner of applying the proceeds."

Jenny vs. Laurens, 1 Spears L., 341.
Wilson vs. Cheshire, 1 McC. Ch., 579.

Posey vs. Cook, 1 Hill L., 267.
Rice ads. Burnett, Speers Eq., 563.
Ex parte Gadsden, 3 Rich., 467.
Williman vs. Holmes, 4 Rich. Eq., 479.
Creighton vs. Pringle, 3 S. C., 78.
Howard vs. Henderson, 18 S. C., 189.
Wieters vs. Timmons, 25 S. C., 493.

Yet, to sustain this exception to the rule—"in cases of trusts for married women,"—"it must appear that the estate conveyed was a *separate estate*, intended for her sale and separate use and benefit, free from the debts and all control of her husband."

Wilson vs. Bailer, 3 Strob. Eq., 260.
Williman vs. Holmes, 4 Rich. Eq., 479.
Charles vs. Jacobs, 2 S. C., 122.
Bouknight vs. Epting, 11 S. C., 76.
Dunlap vs. Garlington, 17 S. C., 573.
Howard vs. Henderson, 18 S. C., 189.

Or, to sustain the exception—"to preserve contingent remainders"—"the terms of the instrument must show that such was the *purpose* of interposing a trustee."

Howard vs. Henderson, 18 S. C., 190.

Otherwise the Statute applies, "notwithstanding the contingency of the remainders."

Faber vs. Police, 10 S. C., 385.
Howard vs. Henderson, 18 S. C., 192.

3. Trusts of *personal* property are not within the operation of the Statute of Uses, and are not executed by operation of law, as cases within the Statute; and are only executed by some act of the trustee, as delivering possession.

Rice vs. Burnett, Speers Eq., 583.
Harley vs. Platts, 6 Rich. L., 315.
Creighton vs. Pringle, 3 S. C., 78.

4. Executory trusts are generally exempt from the rule in Shelley's case; executed trusts are included.

Porter vs. Darby, 2 Rich. Eq., 52.

5. Deed in trust "to hold for the sole and separate use, benefit and behoof" of a woman and her children, makes the mother a tenant in common with the children *in land*, while it would have given her an absolute, entire estate in personalty.

Wallace vs. Craig, 27 S. C., 524.

6. The separate estate of a married woman can be created in three ways: 1. Where the technical words, "sole and separate use" or others equivalent are used. 2. Where the marital rights are expressly excluded. 3. Where the wife is empowered to perform acts, concerning the estate given, inconsistent with the legal disabilities of coverture; and where there is a manifest intent to create a separate estate, even though no express words of that import be employed, such intent should be effectuated.

Nix vs. Bradey, 6 Rich. Eq., 48.

Ellis vs. Woods, 9 Rich. Eq., 19.

Markley vs. Singletery, XI. Rich. Eq., 399.

7. Such separate estate "is surely equitable. Such an estate is unknown to the Common Law. It is the creature exclusively of Equity. The instant it ceases to be an equitable estate and becomes a legal estate, it perishes." Nor is the intervention of a trustee necessary to its validity.

Markley vs. Singletery, XI. Rich. Eq., 399.

II. FEE-CONDITIONAL.

1. It was an estate *at Common Law*, before the Statute *de donis conditionalibus* in England, upon the condition that the first taker had heirs of his body, to whom, upon his death, the estate was to descend, *per forman doni*, from generation to generation, until the line of the donee became extinct.

Wright vs. Herron, 5 Rich. Eq., 442.

2. It was allowed in this State as early as 1802.

Murrell vs. Mathews, 2 Bay, 398.

Though stated to have been first judicially recognized, in 1824, in Postell vs. Potter, Harper L., 92.

Barksdale vs. Gamage, 3 Rich. Eq., 277.

Often since recognized and now "stands untouched" with us, as a Common Law estate.

Pearse vs. Killian, McM. Eq., 231.

Wright vs. Herron, 5 Rich. Eq., 442.

Withers vs. Jenkins, 14 S. C., 608.

3. Distinguished from *fee simple* in this, that in case of *fee simple* estate the *law* prescribes that the estate shall descend to the

heirs generally, if the ancestor makes no disposition of it; while in case of an estate in *fee conditional*, the *instrument* creating the estate, confines the descent to a *particular class of heirs*, exclusive of others, as to the heirs of a man's body, by which only his lineal descendants are admitted, or to the heirs, male, of his body, in exclusion both of collaterals and lineal females.

Barksdale vs. Gamage, 3 Rich. Eq., 277.
Burnett vs. Burnett, 17 S. C., 551.

So, devise to one "and *her children*" is a *fee conditional.*

Renwick vs. Smith, 11 S. C., 306.

Or, devise to one and "the heirs of her body," is a *fee conditional.*

Murrell vs. Mathews, 2 Bay, 398.
Mazyck vs. Vanderhorst, Bail. Eq., 48.
LaBorde vs. Penn, McM. Eq., 449.
Smith vs. Hilliard, 2 Strob. Eq., 214.
Hay vs. Hay, 3 Rich. Eq., 390.
Hull vs. Hull, 2 Strob. Eq., 189.
Barksdale vs. Gamage, 2 Strob. Eq., 274.
Wright vs. Herron, 5 Rich, Eq., 441.
Archer vs. Ellison, 28 S. C., 240.

Or, devise to one and at his death, to his *oldest male* heir, and in case he should die not having any male heir, over, is a *fee conditional.*

Graham vs. Moore, 13 S. C., 119.

Or, to one and "the lawful issue of his body."

Whitworth vs. Stuckey, 1 Rich. Eq., 404.
Dunlap vs. Garlington, 17 S. C., 572.

Or, deed "in trust for daughter and the lawful heirs of her body, creates *equitable fee conditional* in daughter."

Withers vs. Jenkins, 14 S. C., 608.
Withers vs. Jenkins, 21 S. C., 368.

It is further distinguished by the fact that in *fee conditional* the estate *reverts* to the donor, upon *failure of the particular class* of heirs designated, at any time.

Bedon vs. Bedon, 2 Bail. L., 248.
Wright vs. Herron, 5 Rich. Eq., 443.
Withers vs. Jenkins, 14 S. C., 611.

Burnett vs. Burnett, 17 S. C., 551.
Withers vs. Jenkins, 21 S. C., 368.

So that when devisor parts with his *entire* estate in a devise, it cannot be a *fee conditional*, because there is *no possibility of reverter*.

Bedon vs. Bedon, 2 Bail. L., 248.

4. It exists *in equity*, as a trust or use, as well as *in law*, with all the same rules of descent and otherwise, and accompanied with most of the incidents and attributes of such estates at Law.

Withers vs. Jenkins, 14 S. C., 608.

5. To *create it*, there must be either words of inheritance and procreation, or words indicating intention that the estate should pass indefinitely, in the general or special line of the first taker.

Bedon vs. Bedon, 2 Bail. L., 248.

"To one and the heirs of his body" is the most proper and apt form of language to create such an estate.

Wright vs. Herron, 5 Rich. Eq., 443.
Withers vs. Jenkins, 14 S. C., 610.

Yet it *may be implied* in the first taker, *from* words devising the estate over, if he die without issue, although the devise to him be *expressly* for life.

Moore vs. Paul, 7 Rich. Eq., 362.
Addison vs. Addison, 9 Rich. Eq., 63.

But never, unless the implication is a *direct and necessary inference*, from the face of the will.

Carr vs. Porter, 1 McC. Ch., 79.
Bedon vs. Bedon, 2 Bail. L., 247.
Adams vs. Chapline, 1 Hill Ch., 282.
Edwards vs. Barksdale, 2 Hill Ch., 198.
McClure vs. Young, 3 Rich. Eq., 559.
Williams vs. Caston, 1 Strob., 130.
Buist vs. Dawes, 4 Rich. Eq., 423.

It cannot be created out of a term for years in any *personal chattel, except in the instance of annuity.*

Henry vs. Feider, 2 McC. Ch., 339.

6. The first holder of such fee *can dispose* of it by some act, *which takes effect during his life time*, but *not by will;* and prevent

such reversion and *bar* the remainder.

Jones vs. Portall, Harper L., 92.
Izard vs. Middleton, Bail. Eq., 227.
Barksdale vs. Gamage, 3 Rich. Eq., 279.
Burnett vs. Burnett, 17 S. C., 551
Withers vs Jenkins, 14 S. C., 608.
Withers vs. Jenkins, 21 S. C., 368.

Because the "heirs of the body" take nothing as against the ancestor. They are not named for any personal benefit, but only to define the nature and extent of *his estate*, and to point out the course of the descent, if he make no disposition of it.

Izard vs. Middleton, Bail. Eq., 227.

But such alienation to be so effective must be made either *after the birth*, and, during the life time, of such issue.

Murrell vs. Mathews, 2 Bay, 398.
DeHay vs. Porcher, 1 Rich. Eq., 270.
Barksdale vs. Gamage, 3 Rich Eq., 279.
Graham vs Moore, 13 S. C., 119.

Or, *after the birth and death* of such issue.

Barksdale vs. Gamage, 3 Rich. Eq., 279.

Because the condition having been performed *by the birth* of such issue, it is entirely gone and the thing to which it is annexed, becomes thenceforth absolutely and wholly unconditional.

And such alienation, made *before the birth* of such issue, *if* the issue *afterwards born, die in the life time of the* first taker, will *not* have such effect.

Barksdale vs. Gamage, 3 Rich., 279.

Moreover, the first taker can acquire *fee simple* title, and thus *bar* the *reversion*, by a *release* from such issue.

Pearse vs. Killian, McM. Eq., 233.

7. But where the first taker made no such alienation, and the issue designated survive him, yet if they die *childless*, the estate reverts back to the donor.

Wright vs. Herron, 5 Rich. Eq., 443.
Withers vs. Jenkins, 14 S. C., 608.
Withers vs. Jenkins, 21 S. C., 368.

8. It cannot support a remainder, because, the *whole* estate

being given, there *remains nothing to go over.*

Mazyck vs. Vanderhorst, Bail. Eq., 49.

McClure vs. Young, 3 Rich. Eq., 574.

9. Lands in *fee conditional* were first held to be bound after the birth of issue, only by the *lien* of a judgment or decree against the first taker, in bar of the right of the issue to take *per forman doni.*

Izard vs. Middleton, Bail. Eq., 221.

But now it is settled that the issue or heirs take the land, subject also to the general debts of first taker.

Burnett vs. Burnett, 17 S. C., 550.

10. The same words that create a *fee conditional* in realty, create an *absolute* estate in *personalty.*

Carr vs. Porter, 1 McC. Ch., 60.

Henry vs. Felder, 2 McC. Ch., 339.

Mazyck vs. Vanderhorst, Bail. Eq., 47.

Bedon vs. Bedon, 2 Bail. L., 248.

Moore vs. Paul, 7 Rich. Eq., 362.

Addison vs. Addison, 9 Rich. Eq., 68.

Renwick vs. Smith, 11 S. C., 306.

Dunlap vs. Garlington, 17 S. C., 572.

Andrews vs. Loeb, 22 S. C., 275.

11. A fee conditional to one and his lawful issue, may be cut down to a *life estate* in the first taker, where the context shows that the word issue does not mean issue *generally*, but issue at a particular time who are to take a *purchasers.*

McCorkle vs. Black, 7 Rich. Eq., 411.

III. REMAINDERS.

1. A remainder is what is left of an *entire estate*, after the preceding part of the *same estate* has been disposed of.

Bouknight vs. Brown, 16 S. C., 170.

2. The rule to distinguish between *vested* and *contingent* remainders is, that if the remainderman is *in capacity to take* at the time the instrument takes effect, *whenever* the possession become vacant, and is only withheld *from the possession* by the temporary right of enjoyment in another, he has a *vested trans-*

missible interest and *not* one that is merely *contingent.* Where the right to the *estate* is fixed, though the right to the *enjoyment* is *deferred* to some future period, the remainder is *vested;* but where the right to the *estate,* as well as the right to the *enjoyment,* is not *only deferred* but is *dependent* upon the happening of some *future contingency,* the remainder is *contingent.*

Bankhead vs. Carlisle, 1 Hill Ch., 259.
Bentley vs. Long, 1 Strob. Eq., 44.
Faber vs. Police, 10 S. C., 386.
Farr vs. Gilreath, 23 S. C., 512.

As where the remainder is to persons *in esse* at the time the limitation was made, and upon an *event certain,* as at death of life tenant, it is a *vested, transmissible remainder* in such persons.

Vidal vs. Verdier, Speers Eq., 412.
Williams vs. Holmes, 4 Rich. Eq., 481.
Pritchett vs. Cannon, 10 Rich. Eq., 405.
Wilson vs. McJunkin, 11 Rich. Eq., 527.
Farrow vs. Farrow, 12 S. C., 172.
Bannister vs. Bull, 16 S. C., 227.
McIntyre vs. McIntyre, 16 S. C., 290.
Cunningham vs. Cunningham, 20 S. C., 318.
Boykin vs. Boykin, 21 S. C., 529.

Or if a devise or bequest to a class, as children, at death of life tenant, the *remainder is vested* in those *living at death of testator.*

Rainsford vs. Rainsford, Speers Eq., 397.
Evans vs. Durant, 1 Strob. Eq., 82.
Bently vs. Long, 1 Strob. Eq., 411.
Shuler vs. Bull, 15 S. C., 432.
Bannister vs. Bull, 16 S. C., 220.
McCreery vs. Burns, 17 S. C., 53.

Or if a devise or bequest to a class, as issue, *living at death* of life tenant, the remainder is vested in such issue.

Seabrook vs. Gregg, 2 S. C., 68.

Or, if by deed to afterborn issue, to take share and share alike, it is *vested.*

Rutledge vs. Rutledge, Dud. Eq., 205.

Or, if by deed to those living at *date of deed,* it is *vested,* but opens to let in others of class, as born, who also take *vested* in-

terests at birth.

Gourdin vs. Deas, 27 S. C., 484.

But where the remainder is both to a *dubious* and *uncertain person*, and upon an *uncertain event*, it is *contingent*.

Dehon vs. Redfern, Dud. Eq., 118.
Faber vs. Police, 10 S. C., 387.
Leroy vs. City Council of Charleston, 20 S. C., 76.

Or so, if to an *uncertain person* alone, as to children *who survive* life tenants.

Dehon vs. Redfern, Dud. Eq., 118.
Bouknight vs. Brown, 16 S. C., 156.
Thomas vs. Poole, 19 S. C., 336.
Otis vs. Brown, 20 S. C., 587.
Mosely vs. Hankinson, 22 S. C., 328.
Farr vs. Gilreath, 23 S. C., 512.
Roundtree vs. Roundtree, 26 S. C., 462.
Henderson vs. Kinard, 29 S. C., 17.

Or so, if upon an *uncertain event alone, as* upon *surviving* the life tenant, or upon life tenant *leaving no issue* alive at death, or upon the alternative of his death *or* marriage.

McJunkin vs. Brummett, 2 Hill Ch., 638.
Murphy vs. Reynolds, 3 Rich. L., 12.
Risher vs. Adams, 9 Rich. Eq., 249.
Faber vs. Police, 10 S. C., 386.
McElwee vs. Wheeler, 10 S. C., 392.
Ex parte Roberts, 19 S. C., 160.
Boykin vs. Boykin, 21 S. C., 513.
Dickson vs. Dickson, 23 S. C., 224.
Farr vs. Gilreath, 23 S. C., 512.

3. Remainder, *though vested*, may be *defeasible* upon the happening or failure of a contingency or condition in the future.

Rivers vs. Tripp, 4 Rich. Eq., 286.
Kersh vs. Yongue, 7 Rich. Eq., 100.
Bowman vs. Lobe, 14 Rich. Eq., 276.
Seabrook vs. Gregg, 2 S. C., 78.

4. And remainder, though *contingent*, is *transmissible* to the heirs or representatives of the remaindermen, even though he *die before the event* upon which he is to take, where he is *ascer-*

tained and certain, and his existence at the time of such event *does not* constitute the *contingency* upon which the remainder is to *vest in him,* but where only the *event* upon which he is to take, is *uncertain.* It is not *so transmissible, where* the person to take is *uncertain, until* the estate becomes *vested* by the happening of the contingency.

McMeekin vs. Brummett, 2 Hill Ch., 638.
Pritchett vs. Cannon, 10 Rich. Eq., 394.
Dickson vs. Dickson, 23 S. C., 225.
Roundtree vs. Roundtree, 26 S. C., 462.

5. But contingent remainders could be destroyed by life tenant at Common Law, by fine and recovery, by merger of the particular estate, or by any *displacement* thereof.

Bouknight vs. Brown, 16 S C., 170.

Or, by feoffment, with livery of seizin.

Dehon vs. Redfern, Dud. Eq., 118.

But if life tenant is only a *cestui que trust,* he can not bar the remainder by such feoffment and livery of seizin, the *legal estate* being in the trustee; though he may do so, by suffering a recovery.

Dehon vs. Redfern, Dud. Eq., 119.

Yet, though trust be not executed, the trustee might, *by joining with life tenant in feoffment,* defeat contingent remainder before it come into existence.

Habersham vs. Hopkins, 4 Strob. L., 240.

6. A remainder cannot be limited on a fee conditional *at Common Law,* for that would be a fee mounted upon a fee and therefore void.

Bedon vs. Bedon, 2 Bail. L., 248.
McClure vs. Young, 3 Rich. Eq., 574.
Allen vs. Fogler, 6 Rich. L., 58.

A limitation that can take effect as a *remainder* cannot be an executory devise.

Bouknight vs. Brown, 16 S. C., 170.

7. And when the preceding freehold has *once vested* no *subsequent accident* will make a *contingent remainder* inure as an *executory devise;* its character as a *remainder* having been finally established.

Bonknight vs. Brown, 16 S. C., 170.

8. Courts favor *vested* remainders, and no remainder will be construed to be *contingent*, which may, *consistently* with the *intention*, be deemed *vested*.

Rutledge vs. Rutledge, Dud. Eq., 204.
Seabrook vs. Seabrook, McM. Eq., 204.
Smith vs. Hilliard, 2 Strob. Eq., 222.
Rivers vs. Fripp, 4 Rich. Eq., 285.
Seabrook vs. Gregg, 2 S. C., 78.
Faber vs. Police, 10 S. C., 386.
Leroy vs. City Council of Charleston, 20 S. C., 75.

See: Feoffment and livery of seizin.
Fee Conditional.
Executory Devise.

IV. FEOFFMENT AND LIVERY OF SEIZIN.

1. Contingent remainders, prior to the Act of 1883, 18 Stat., 430, could be barred by deed of feoffment and livery of seizin, by the life tenant, of the legal estate, because this determined the *particular* estate, before the happening of the contingency, upon which the remainder was to vest.

Dehon vs. Redfern, Dud. Eq., 118.
Dehon vs. Middleton, Rice Eq., 459.
Habersham vs. Hopkins, 4 Strob. L., 240.
McElwee vs. Wheeler, 10 S. C., 394.
Faber vs. Police, 10 S. C., 389.

The grounds of this principle are thus stated in Dehon vs. Redfern:

"By alienating in this manner, the tenant for life *forfeits* his estate for two reasons: 1. That it is a renunciation of his feudal duties, and 2. That his own act has determined his entire interest. Then the rule comes in that a contingent remainder must take effect the *instant* that the preceding estate determines, or it *is gone forever*. The next taker is entitled to enter regularly, as in his remainder or reversion."

And the rule is the same if the remainderman is an infant.

Dehon vs. Redfern, Dud. Eq., 115.
Redfern vs. Middleton, Rice. Eq., 459.

2. This feoffment and livery of seizin by tenant for life, together with release of right of entry and action, by next taker in remainder or reversion, gives good title to purchaser.

Redfern vs. Middleton, Rice Eq., 459.

3. But if the estate be in *trust*, and the *legal* estate in the *trustee* and *not executed in the life tenant*, his deed of feoffment and livery of seizin, could not bar the contingent remainder.

Dehon vs. Redfern, Dud. Eq., 119.

Faber vs Police, 10 S. C., 389.

Nor would it then be barred by fine and recovery, by merger of the particular estate, or by any displacement thereof.

Dehon vs. Redfern, Dud. Eq., 119.

Bonknight vs. Brown, 16 S. C, 170.

4. But contingent remainders can no longer be so barred, since the Act of 1883, 18 Stat., 430, which expressly forbids it.

V. EXECUTORY DEVISE.

1. An executory devise is a limitation by *will* of a *future* contingent interest in lands, contrary to the rules of limitation of contingent estates in *conveyances* at law.

Mangum vs. Piester, 16 S. C, 325.

And, if the limitation does not depart from such rules prescribed for contingent remainders, it is *a contingent remainder* and not an *executory devise*.

Mangum vs. Piester, 16 S. C., 325.

It was intended to remedy difficulties surrounding conveyances at Common Law; particularly the difficulty arising from the rule at Common Law, which forbids an estate to be limited over to another, after a fee already granted, and the difficulty arising from the rule which would not permit a *future freehold* to be created, and also the difficulty arising from another rule that would not allow a fee to be mounted on a fee. All of these can be done by executory devises.

Allen vs. Fogler, 6 Rich. L., 58.

Mangum vs. Piester, 16 S. C., 325.

2. But as they would have inevitably led to perpetuities, "it was established as a part of the machinery of executory devises,

that the contingency, upon which the limitation intended was to take effect, should not be postponed longer than a life or live in being and twenty-one years" and nine months.

Mangum vs. Piester, 16 S. C., 325.

3. So that an executory devise cannot be good after an indefinite failure of issue.

Cooper vs. Cooper, 2 Brev., 355.
Norton vs. Fripp, 1 Spears L., 234.
Mangum vs. Piester, 16 S. C., 329.

4. And is void, where limited upon the determination of a fee simple, conditional estate; because that would be after an indefinite failure of issue, capable of taken *per forman doni.*

Bedon vs. Bedon, 2 Bail L., 248.

Though the Court of Errors, subsequently, differed upon this point, by way of *dicta*, it not being necessary to decide it.

Buist vs. Dawes, 4 Rich. Eq., 421.

5. Property devised to two sons, to be equally divided between them, but should either die unmarried and without issue, the remainder of his share to go to the survivor; but should both die unmarried and intestate, then over. The limitation was held good, as an executory devise.

Andrews vs. Roye, 12 Rich. L., 543.

6. Personal chattels may be limited over by an executory devise, or deed of trust; but not by any other means.

Cooper vs. Cooper, 2 Brev., 43.

See: Remoteness.
Fee conditional.
Remainders.

VI. CONDITIONS.

1. Conditions are of two kinds, *precedent* and *subsequent.* A condition *precedent* is a condition *upon the happening of which* an estate *will vest.* A condition *subsequent defeats an estate already vested.*

Moore vs. Sanders, 15 S. C., 442.

2. A limitation upon a *condition precedent* or *subsequent, possi-*

ble and not against public policy, which is *not performed, fails,* and the estate goes over upon such failure as directed.

Ex parte Yown, 17 S. C., 535.
McGee vs. O'Neill, 19 S. C., 181.
Thomas vs. Kelly, 3 S. C., 210.
Hammond vs. Railroad Co., 15 S. C., 11.

3. But generally *conditions subsequent* to be valid must *not* be *repugnant* to the estate given or devised; they must *not* be an *exception* to the *very thing,* that is, to the *substance* of the gift; if so, they are *void* and the estate is unaffected thereby.

Moore vs. Sanders, 15 S. C., 442.

4. The ordinary rule as to *conditions subsequent* is, that the fee, unburdened of the condition remains absolute.

Renwiek vs. Smith, 11 S. C., 305.

5. The title in personalty may be divested upon a condition annexed in the conveyance.

Hill vs. Hill, Dud. Eq., 76.

6. Limitation over, on the double contingency that the first taker should die without issue *and* before 21 years of age, *fails,* when *either* contingency *occurs.*

Perry vs. Logan, 5 Rich. Eq., 215.
China vs. White, 5 Rich. Eq., 433.
Shand vs. Rogers, 7 Rich. Eq., 4.

7. When *time* is the *substance* of the gift, the estate conditional upon it, does *not vest* absolutely until *then;* and if one, who was *then* to take, has died before, the provision in his behalf never vested.

Seabrook vs. Seabrook, McM. Eq., 210.

8. But where *time* is *not* the *substance* of the gift, the estate conditioned thereon *does vest* before then, defeasible upon failure of condition.

Rivers vs. Fripp, 4 Rich. Eq., 300.
Brabham vs. Crossland, 25 S. C., 545.

VII. POWERS.

1. The donor of a power may prescribe the particular mode

in which it is to be exercised, and there can be no valid execution of the power unless the mode prescribed is strictly complied with.

Blount vs. Walker, 28 S. C., 548.

2. A gift to one and such persons as he shall appoint, is absolute property in such an one, without the appointment, because the *power* implies an absolute estate. But if the power be not general, or by *will only*, such implication does not arise; or if the gift is to one *for life*, and after his death to such person as he shall appoint *by will*, he takes only a life estate, and must make an appointment to make the power effectual.

Holbrook vs. Gaillard, Riley Eq., 179.
Pulliam vs. Byrd, 2 Strob. Eq., 134.
Scott vs. Burt, 9 Rich. Eq., 360.
Aaron vs. Beck, 9 Rich. Eq., 411.
Wilson vs. Gaines, 9 Rich. Eq., 420.

The estate limited for life, being express and certain, the *power* is a distinct gift and comes in by way of addition; but when executed, conveys the estate authorized.

Bentham vs. Smith, Chev. Eq., 35.
Canedy vs. Jones, 19 S. C., 304.

3. The Court will not *imply* an absolute estate when the interest of the donee is expressly limited to a life estate.

Wilson vs. Gaines, 9 Rich. Eq., 421.

Nor does such implication arise if the power be not general.

Bentham vs. Smith, Chev. Eq., 33.

REMOTENESS.

1. Limitations, to be good, must take effect within twenty-one years and nine months, the time fixed by law, to prevent perpetuities. If to take effect beyond that time or indefinitely, they are void for remoteness.

Guerry vs. Vernon, 1 N. & McC., 69.
Henry vs. Felder, 2 McCh., 323.
Postell vs. Postell, Bail. Eq., 383.
Cox vs. Buck, 5 Rich. L., 605.

2. "In examining whether a limitation over is valid or not,

the quantity or duration of the previous title, generally, can have no decisive influence, If it be *doubtful* whether the limitation be within the lawful time, *then* the quantity of the previous title may aid in resolving the doubt, one way or the other; but if the time for the limitation to take effect be clearly fixed, and so fixed as to fall within twenty-one years of existing lives, the limitation will be good, whatever the duration of the partlcular estate or title may be. For let it be borne in mind that the restrictions upon limitations over are intended to prevent perpetuities; a reason, which has nothing to do with the quantity of the particular estate, but only with the *degree of remoteness* of the limitations."

Hill vs. Hill, Dud. Eq., 76.

See PHRASES, 1.
EXECUTORY DEVISES, 2.

PHRASES.

"DYING WITHOUT ISSUE" AND EQUIVALENT TERMS.

1. These phrases *when standing alone, before the Act of 1853* (Gen. Stat., Sec. 1862), denoted an entire and *indefinite* failure of issue, and a limitation over, upon such terms *unqualified*, has even been held void for remoteness. There can no case be found to the contrary.

Guery vs. Vernon, 1 N. & McC., 69.
Henry vs. Felder, 2 McC. Ch., 335.
Manigault vs. Deas, Bail. Eq., 292.
Henry vs. Archer, Bail. Eq., 536.
Postell vs. Postell, Bailey L., 390.
Brummett vs. Barber, 2 Hill L., 543.
Norton vs. Fripp, 1 Spears L., 235.
Murray & Buchanan, vs. Walker, 1 Strob. Eq., 193.
Sheppard vs. Sheppard, 2 Rich. Eq., 142.
Cox vs. Buck, 5 Rich. L., 605.
Leslie vs. Collier, 3 Rich. Eq., 125.
Moore vs. Paul, 7 Rich. Eq., 358.
Graham vs. Moore, 13 S. C., 119.
Mendenhall vs. Mower, 16 S. C., 312.
Mangum vs. Piester, 16 S. C., 327.

2. But these terms may be qualified by *subsequent words*, and when so qualified, *as to be restricted to the death of the first taker*, the limitation over will be good. The words which thus qualify are usually such as these: "leaving issue," "issue living," "survivors" and words of like import.

Mangum vs. Piester, 16 S. C., 327.

For instance:

Such terms in a *bequest* or deed of gift of *personalty* would be sufficiently qualified to restrict the failure of issue to the death of the first taker, and make the limitation valid, by the words "*without leaving issue*," or "*leaving no issue*," or "*without living* issue," or "*leaving* no heirs of his body," and the like.

Mazyck vs. Vanderhorst, Bail. Eq., 47.
Gregg vs. Harlee, Dud. Eq., 44.
Henry vs. Means, 2 Hill L., 41.
Brummett vs. Barber, 2 Hill L., 227.
McClure vs. Young, 3 Rich. Eq., 559.
Zimmerman vs. Wolf, 4 Rich. Eq., 333.
Perry vs. Logan, 5 Rich. Eq., 215.
Pritchett vs. Cannon, 10 Rich. Eq., 404.
McCorkle vs. Block, 7 Rich. Eq., 411.
Folk vs. Varn, 9 Rich. Eq., 303.

But *not so* in a *devise* or deed of *realty*.

Carr vs. Porter, 1 McC. Ch., 60.
Mazyck vs. Vanderhorst, Bail. Eq., 48.
Whitworth vs. Stuckey, Bail. Eq., 40.
DeHay vs. Porcher, 1 Rich. Eq., 270.
Hay vs. Hay, 3 Rich. Eq., 390.
Perry vs. Logan, 5 Rich. Eq., 215.
Shands vs. Rogers, 7 Rich. Eq., 4.
Curry vs. Sims & Jeter, 11 Rich. L., 489.
Addison vs. Addison, 9 Rich. Eq., 68.
Graham vs. Moore, 13 S. C., 118.

The words "not *having* male heir" not as effectual to so restrict.

Graham vs. Moore, 13 S. C., 118.

And such terms would also be so restricted where there is a direct gift to the issue, in the first instance, and a limitation over of *either personalty or realty*, to a *survivor or survivors*, of

person *in esse* at date of gift, on the death of the first taker without lawful issue.

Keating vs. Reynolds. 1 Bay, 82.
Treville vs. Ellis, Bail. Eq., 37.
Stevens vs. Patterson, Bail. Eq., 39.
Henry vs. Archer, Bail. Eq., 534.
Hill vs. Hill. Dud. Eq., 78.
Seabrook vs. Mikell, Chev. Eq., 80.
Rogers vs. Randall, 2 Spears L, 33.
Cordes vs. Adrian, 1 Hill Ch., 154.
Halbrook vs. Gaillord, Riley Eq., 179.
Terry vs. Brunson, 1 Rich. Eq., 87.
Yates vs. Mitchell, 1 Rich. Eq., 268.
Murray vs. Walker, 1 Strob. Eq., 193.
Pulliam vs. Byrd, 2 Strob. Eq., 134.
Templeton vs. Walker, 3 Rich. Eq., 541.
Collier vs. Collier, 3 Rich. Eq., 555.
Lowry vs. O'Bryan, 4 Rich. Eq., 264.
Mathis vs. Hammond, 6 Rich. Eq., 404.
McCorkle vs. Black, 7 Rich. Eq., 411.
Carson vs. Kennerly, 8 Rich. Eq., 267.
Scott vs. Burk, 9 Rich. Eq., 358.
Evans vs. Harlee, 9 Rich. Eq., 511.
Nix vs. Ray, 5 Rich. L., 425.
Mendenhall vs. Mower, 16 S. C., 312.
Reams vs. Spann, 25 S. C., 565.
McGehee vs. Hall, 26 S. C., 183.

Provided: The "survivor" or "survivors" are meant to take and enjoy the benefit *individually*, and not to *transmit it* to heirs and representatives, because the heirs and representatives would be entitled *at any time* the issue of first taker failed.

Stevens vs. Patterson, Bail. Eq., 39.
Treville vs. Ellis, Bail. Eq., 40.
Postell vs. Postell, Bail. Eq., 390.
Lowry vs. O'Bryan, 4 Rich. Eq., 264.
Cox vs. Buck, 5 Rich. L., 606.
Barksdale vs. Gamage, 3 Rich. Eq., 273.
Pressley vs. Davis, 7 Rich. Eq., 107.
Mangum vs. Piester, 16 S. C., 328.

Provided further: The words are not used as synomonous with the word "others," or like, when they would have no such restrictive sense.

Pressley vs. Davis, 7 Rich. Eq., 107.

Neither the *naming* of the party to whom the limitation over is made, nor the adverb, *then*, following such terms, is sufficient to restrict them to mean failure of issue at death of first taker.

Guerry vs. Vernon, 1 N. & McC., 75.

Mangum vs. Piester, 16 S. C., 328.

3. And such phrases may be further restricted to mean such failure of issue *during the life time* of the first taker, where the testator "giving a remainder after an estate for life, using one set of expressions denoting that the remainder is to take an absolute estate, and another set of expressions limiting him to an estate for life, with remainder to his issue, and a limitation over in the event of not having issue, this apparent repugnance may be reconciled by restricting the dying without issue to the life time of the tenant for life, thus permitting every part of the will to have its proper effect."

Anderson vs. Smoot, Speers Eq., 312.

Vidal vs. Verdier, Speers Eq., 402.

Yates vs. Mitchell, 1 Rich. Eq., 269.

Evans vs. Godbold, 6 Rich. Eq., 26.

Schopper vs. Gillam, 6 Rich. Eq., 83.

Blum vs. Evans, 10 S. C., 81.

Mendenhall vs. Mower, 16 S. C., 312.

4. A limitation over of property, given to one for life with remainder to her surviving issue, upon her dying without such surviving issue, does not fail, because the life tenant dies, during the testator's life time, without such issue.

Johnson vs. Harrelson, 6 S. C., 336.

5. But such terms are now controlled by the Act of 1853, (Gen'l Stat., Sec. 1862), as to limitations, *in instruments taking effect since that date*, and shall not be construed to mean an indefinite failure of issue, but a failure of issue at the time of the death of the first taker.

Simons vs. Bryce, 10 S. C., 365.

Blum vs. Evans, 10 S. C., 81.

Mendenhall vs. Mower, 16 S. C., 312.

CLASSES.

1. A *class* of persons is an aggregate body of persons, *uncertain in number* at the time of the gift, *to be ascertained* at a *future time.*

Dickson vs. Dickson, 23 S. C., 224.

So, the word "children" indicates a class of persons to take at a particular period, and they take as purchasers and not by descent.

Bannister vs. Bull, 16 S. C., 227.
Smith vs. Smith, 24 S. C., 314.

2. In cases of gift, by will or deed, to *a class*, all who constitute the *class* at *the period when* the *provision* takes effect, *whether* in esse at the date of the instrument or afterwards born, take *equally and per capita.*

Myers vs. Myers, 2 McC. Ch., 256.
Swinton vs. Legare, 2 McC. Ch., 446.
Cole vs. Creyon, 1 Hill Ch., 311.
Henry vs. Archer, Bail. Eq., 527.
Ruff vs. Rutherford, Bail. Eq., 7.
Lemacks vs. Glover, 1 Rich. Eq., 143.
Chapline vs. Turner, 2 Rich. Eq.
Deveaux vs. Deveaux, 1 Strob. Eq., 283.
McGregor vs. Toomer, 2 Strob. Eq., 51.
Perdriaw vs. Wells, 5 Rich. Eq., 30.
Corbett vs. Laurens, 5 Rich. Eq., 324.
Folk vs. Varn, 9 Rich. Eq., 303.
Wessinger vs. Hunt, 9 Rich. Eq., 464.
Clark vs. Clark, 19 S. C., 350.
Shands vs. Mills, 25 S. C., 362.

But only those in existence at *such period* can take; the predeceased ones or their representatives are excluded.

Corbett vs. Laurens, 5 Rich. Eq., 324.
Dickson vs. Dickson, 23 S. C., 224.
Shanks vs. Mills, 25 S. C., 362.

So, in a gift to *grandchildren* as a class, they take in exclusion of *great* grandchildren and *great-great* grandchildren.

Heyword vs. Hasell, 2 S. C., 509.

3. The arbitrary, but settled general rule, is, "that if there

be a gift to an individual by name," and to other individuals, designated as a class—or if it be to the children of A. and the children of B.—*all* take equally and per capita.

Perdriaw vs. Wells, 5 Rich. Eq., 27.
Barksdale vs. McBeth, 7 Rich. Eq., 133.
Dupont vs. Hutchinson, 10 Rich. Eq., 2.
Feemster vs. Good, 12 S. C., 573.

But the rule does not apply *when the title is to accrue at different times*, or if there a gift to an ascertained individal *and* to *a class* of *unascertained* individuals. In such case, one half of the property vests in said individual and the other half in the individuals collectively when they are ascertained.

Cole vs. Creyon, 1 Hill Ch., 311.
Connor vs. Johnson, 2 Hill Ch., 41.
Barksdale vs. McBeth, 7 Rich. Eq., 133.
Dupont vs. Hutchinson, 10 Rich. Eq., 2.
Archer vs. Munday, 17 S. C., 90.

And, another modification of said rule is, that "wherever the Court is compelled, by the terms of description in a devise or grant, to resort to our Statutes of Distribution for the purpose of accertaining the *objects* of a gift, we must also resort to the statute to ascertain the *proportion* in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution should be pursued."

Templeton vs. Walker, 3 Rich. Eq., 543.
Collier vs. Collier, 3 Rich. Eq., 555.
Barksdale vs. McBeth, 7 Rich. Eq., 133.

4. But the intention appearing that the children of each of two sons shall each as a class take an equal part of the gift, the property was divided into equal shares—one for each set of children.

Chaplin vs. Turner, 2 Rich. Eq., 140.
Crim vs. Knotts, 4 Rich. Eq., 346.

5. A gift in the words, "to my sons, equally to be divided," was not a gift to them as a class, so as to give the right of survivorship.

Boykin vs. Boykin, 21 S. C., 528.

WORDS.

I. CHILDREN.

1. Means *primarily, immediate offspring*, and not a line of *indefinite descent*, like *heirs, issue*, or *heirs of the body.*

McClure vs. Young, 3 Rich. Eq., 559.
Bannister vs. Bull, 16 S. C., 227.
Smith vs. Smith, 24 S. C., 314.
Shanks vs. Mills, 25 S. C., 362.

2. Not equivalent to *issue;* children not extending beyond *grandchildren*, the other embracing *whole line of descendants.*

Brummett vs. Barber, 2 Hill L., 552.
Burleson vs. Bowman, 1 Rich. Eq., 111.

3. But *bodily issue* may mean children.

Duncan vs. Harper, 4 S. C., 84.

4. Embraced in lineal descendants, under Statutes of Distributions.

McClure vs. Young, 3 Rich. Eq., 576.

5. *Legal heirs* may mean children.

Swann vs. Poag, 4 S. C., 18.

6. Synonymous with *heirs of the body.*

Simons vs. Bryce, 10 S. C,, 365.
McCown vs. King, 23 S. C., 238.
Archer vs. Ellison, 28 S. C., 242.

7. *Heirs* may be construed to mean *children*, but only when context demands it.

Hayne vs. Irvine, 25 S. C., 292.
Archer vs. Ellison, 28 S. C., 242.

8. Does not mean *grandchildren*, except *where* there are *no children* or *some conclusive circumstance* to show that testator intended such meaning.

Ruff vs. Rutherford, Bail. Eq., 7.
Snoddy vs. Snoddy, 1 Strob. Eq., 84.
Mathis vs. Hammond, 6 Rich. Eq., 121.
Pressley vs. Davis, 7 Rich. Eq., 107.

Addison vs. Addison, 9 Rich. Eq., 67.
Thomas vs. Poole, 19 S. C., 325.
Shanks vs. Mills, 25 S. C., 361.

9. Nor does the term embrace *illegitimate* children unless the intention to include is *clearly expressed* or *necessarily implied.*

Shearman vs. Angel, Bail. Eq., 344.

10. Children is *ordinarily and primarily* a word of *purchase;* but *not unfrequently* made a word of *limitation* by the context.

Drayton vs. Drayton, 1 Dess., 331.
DeVeaux vs. Barnwell, 1 Dess., 499.
Smith's Case, 2 Dess., 123.
Ruff vs. Rutherford, Bail. Eq., 9.
Johnson vs. Johnson, McM Eq., 345.
Reeder vs. Spearman, 6 Rich. Eq., 67.
Simons vs. Bryce, 10 S. C., 365.
Williams vs. Kibler, 10 S. C., 426.
Hill vs. Thomas, 11 S. C., 357.
Bannister vs. Bull, 16 S. C., 228.

11. In devise to *children* as a class, if there is no definite period for distribution, the legacy vests *at death of testator,* and none can take but those *in esse then.* But where there is a *fixed period,* all the children born *before* that time, will be let in as a part of the class, and none others; yet only those *then alive* will take, to the exclusion of the representative of any predeceased.

Taveau vs. Ball, 1 McC. Ch., 7.
Myers vs. Myers, 2 McC. Ch., 256.
Swinton vs. Legare, 2 McC., Ch , 441.
Cole vs. Creyon, 1 Hill Ch., 311.
Deveaux vs. Deveaux, 1 Strob. Eq., 283.
Lawton vs. Hunt, 4 Strob. Eq., 15.
Crim vs. Knotts, 4 Rich. Eq., 346.
Perdriaw vs. Wells, 5 Rich. Eq., 30.
Barksdale vs. McBeth, 7 Rich. Eq., 125.
Wessinger vs. Hunt, 9 Rich. Eq., 470.
Clark vs. Clark, 19 S. C., 350.
Shanks vs. Mills, 25 S. C., 361.
Hayne vs. Irvine, 25 S. C., 292.

But if to *several* children, by *name*, the afterborn would have *no such right.*

Myers vs. Myers, 2 McC. Ch., 257.

If to children *surviving* one, only those *alive at the death* of such an one can take, and the representatives of any who may have died before that date, are excluded.

Swinton vs. Legare, 2 McC. Ch., 445.
McGregor vs. Toomer, 2 Strob, Eq., 59.
Shanks vs. Mills, 25 S. C., 361.
Roundtree vs. Roundtree, 26 S. C., 462.

12. If provision be for children and grandchildren *as a class*, both take equally and per capita.

Wessinger vs. Hunt, 9 Rich. Eq., 471.

13. If deed to children *then alive*, and to others *afterborn*, for their equal benefit, the estate vests in those *in esse*, subject to open and let in any *afterborn.*

McNish vs. Guerard, 4 Strob. Eq., 77.

14. Devise to brother for life, and at his death to his children, and then to their children living at his death, share and share alike. At brother's death, one-half of the property passed to the children of *that one* of his two children, which *died before the testator*, because the devise did not lapse, and testator intended some provision in case of each child.

Clark vs. Clark, 19 S. C., 353.

15. Child or children, same as designated person.

Hill vs. Thomas, 11 S. C., 357.

II. HEIRS.

1. The term "heirs," in its primary sense, means the individual fulfilling that description, at the time of the death of the ancestor—a distributee under the Statute of Distributions —to whom the estate passes in case of intestacy. The burden of showing that the term was not used in that sense, rests upon those so claiming:

Seabrook vs. Seabrook, McM. Eq., 206.
Clark vs. Mosely, 1 Rich. Eq., 396.
Evans vs. Godbolt, 6 Rich. Eq., 26.
Shaffer vs. McDuffie, 14 Rich. Eq., 147.

But it is always open to inquiry whether the word "heirs" is used according to its strict and proper acceptation, or in a more inaccurate sense, to denote children, next of kin, etc.

Holeman vs. Fort, 3 Strob. Eq., 66.
Bailey vs. Patterson, 3 Rich. Eq., 158.

It is sometimes synonymous with "children."

Moon vs. Henderson, 4 Dess., 459.
Ramsey vs. Joyce, McM. Eq., 236.
Holeman vs. Fort, 3 Strob. Eq., 66.
Bailey vs. Patterson, 3 Rich. Eq., 158.
Cloud vs. Calhoun, 10 Rich. Eq., 358.
Swann vs. Poag, 4 S. C., 18.
Hayne vs. Irvine, 25 S. C., 292.

2. It is well settled that under a devise to the "heir" of the testator, he can not take as purchaser under the will, but can only take by descent.

Seabrook vs. Seabrook, McM. Eq., 209.
Seabrook vs. Seabrook, 10 Rich. Eq., 503.
Swann vs. Poag, 4 S. C., 181.
Smith vs. Smith, 24 S. C., 314.

So, a devise, upon failure of issue in first taker, "to revert to my own right heirs," *is inoperative*, and the property *intestate*, because the disposition is just as the law distributes it under the Act of 1791.

Rochelle vs. Tompkins, 1 Strob. Eq., 116.
Seabrook vs. Seabrook, 10 Rich. Eq., 508.

But, under a bequest in trust for benefit of son during life, and for daughter if she survive him, and then to go to son's "heirs forever," they took as *purchasers*, it being impossible for trustee to execute the trust at any time during son's life, the daughter surving him.

Porter vs. Doby, 2 Rich. Eq., 53.

3. It is well settled that a qualification of a limitation to the heirs of the body by the addition of the words "and their heirs and assignees forever," *is ineffectual* to turn the words, "heirs of the body," into words of purchase in regard to *real estate*.

Danner vs. Trescott, 5 Rich. Eq., 362.

Although it would be in regard to *personal property*.

Dott vs. Wilson, 1 Bay, 457.
Lemock vs. Glover, 1 Rich. Eq., 141.
Myers vs. Anderson, 1 Strob. Eq., 344.

4. Perpetuity in the line of male heirs not allowed, because contrary to public policy.

Graham vs. Moore, 13 S. C., 119.

5. Where devise or bequest is to heirs, or heirs of the body, share and share alike, they take *per capita*.

Allen vs. Allen, 13 S. C., 530.
Kerngood vs. Davis, 21 S. C., 207.

6. Deed to one, without the word heirs, or some equivalent word of limitation, conveys nothing but a *life estate*, the fee remaining in grantor.

Lorick & Lowrance vs. McCreery, 20 S. C., 429.

III. ISSUE.

1. Is a word of very extensive signification, and *generally* embraces the *whole line* of *lineal descendants* to the *remotest generation*, in *indefinite* succession, who take by *inheritance* and not *as purchasers*.

Henry vs. Means, 2 Hill L., 328.
Henry vs. Archer, Bail. Eq., 535.
Waller vs. Ward, 2 Spears L., 672.
Burleson vs. Bowman, 1 Rich. Eq., 112.
McClure vs. Young, 3 Rich., 573.
Cox vs. Buck, 5 Rich. L., 605.
Moore vs. Paul, 7 Rich. Eq., 364.
Williams vs. Kibler, 10 S. C., 426.
Mendenhall vs. Mower, 16 S. C., 312.
Glenn vs. Glenn, 21 S. C., 308.

Its *general* acceptation, however, *may be modified* by the context; but the context must be *explanatory* or *restrictive*.

Burleson vs. Bowman, 1 Rich. Eq., 112.
Moore vs. Paul, 7 Rich. Eq, 364.
Henry vs. Stewart, 2 Hill L., 42.
Williams vs. Kibler, 10 S. C., 426.
Mendenhall vs. Mower, 16 S. C., 312.

2. It has, however, only *three* meanings, and can only be used in any instrument in one of these senses:

(1) It may describe a *class* of persons who are to take as *joint tenants* with the *parties named*. (2) It may be descriptive of a class who are to take at a definite and fixed time as *purchasers*. (3) It may denote an indefinite succession of lineal descendants who are to take by *inheritance*.

Mendenhall vs. Mower, 16 S. C., 312.

3. *Unexplained*, it is a word of *limitation*.

Moore vs. Paul, 7 Rich. Eq., 364.

But it *may* be a word of *purchase*, restricted to issue that may be *in esse* at a *particular period*, if context require it.

Henry vs. Stewart, 2 Hill L., 42.
Moore vs. Paul, 7 Rich. Eq., 364.
Williams vs. Kibler, 10 S. C., 426.
Mendenhall vs. Mower, 16 S. C., 312.

As when the word is so qualified by additional words as to evince an intention that it is *not* to be taken as descriptive of an *indefinite line of descent*, but is used to indicate a *new stock of inheritance*, the rule in Shelley's case does not apply, and the issue take as purchasers.

Guery vs. Vernon, 1 N. & Mc., 69.
Henry vs. Felder, 2 McC. Ch., 335.
Detreville vs. Richards, Bail. Eq., 37.
Stevens vs. Patterson, Bail. Eq., 42.
Manigault vs. Deas, Bail. Eq., 292.
Postell vs. Postell, Bail. Eq., 390.
Henry vs. Archer, Bail. Eq., 536.
Cordes vs. Adrian, 1 Hill Ch., 154.
Hill vs. Hill, Dud. Eq., 71.
Terry vs. Brunson, 1 Rich. Eq., 79.
Yates vs. Mitchell, 1 Rich. Eq., 265.
Murray vs. Walker, 1 Strob. Eq., 193.
Lowry vs. O'Bryan, 4 Rich. Eq., 263.
McCorkle vs. Black, 7 Rich. Eq., 407.
McIntyre vs. McIntyre, 16 S. C., 294.
Mendenhall vs. Mower, 16 S. C., 312.
Gourdin vs. Deas, 27 S. C., 480.
Boykin vs. Ancrum, 28 S. C., 495.

So, in wills, it is *generally* equivalent to "heirs of the body," though the latter is a stronger and more technical word.

Whitworth vs. Stuckey, 1 Rich. Eq. 412.

But sometimes distinguished.

Henry vs. Stewart, 2 Hill L., 42.

It may mean *children*.

Burleson vs. Bowman, 1 Rich Eq., 111.

Williams vs. Kibler, 10 S. C., 426.

It embraces grandchild.

Rutledge vs. Rutledge, Dud. Eq., 20.

Glenn vs. Glenn, 21 S. C., 308.

4. "*Issue* of her body" is of larger import, and includes classes of persons not embraced by the word grandchildren.

Dunlap vs. Garlington, 17 S. C., 573.

5. A limitation to one and her issue, forever, is *void*, because it imparts a *failure* in the *indefinite* time of heirs of the body, and first taker takes absolutely.

Rumph vs. Rumph, 6 Rich. L., 153.

Murray vs. Walker, 1 Strob. Eq., 196.

Or, if the land devised was to vest in the *issue as purchasers*, or go over to a survivor upon the contingency of one's dying "without lawful issue living at her death," the first taker would take at least a fee conditional.

DeHay vs. Porcher, 1 Rich. Eq., 270.

But a gift by deed or will to one *and* the *issue* of her body forever, but if she should die, *without issue living* at her death, then over, was a *valid* limitation, and the first taker took only a life estate, with remainder to her issue *as purchasers*.

Brummett vs. Barber, 2 Hill L, 227.

Whitworth vs. Stuckey, Bail. Eq., 411.

McClure vs. Young, 3 Rich. Eq., 559.

Corbett vs. Laurens, 5 Rich. Eq., 301.

Mendenhall vs. Mendenhall, 16 S. C., 304.

Yet a bequest *simply to one*, but if she should die without issue *living* at her death, then over, gave the first taker an absolute estate, though issue were living at her death.

McClure vs. Young, 3 Rich. Eq., 559.

And, so a bequest to one *and* his heirs forever, but if she

should die *without lawful issue*, then over, was void as a limitation over, for remoteness, and the first taker took an absolute estate.

Norton vs. Fripp, 1 Spears L., 235.
Brummett vs. Barber, 2 Hill L., 227.
Sheppard vs. Sheppard, 2 Rich. Eq., 142.

And even where the bequest was to one *for life, and* after her death to *her lawful issue*, but if she should die without lawful issue, then over, the limitation was not a valid limitation to her issue as purchasers.

Moore vs. Paul, 7 Rich. Eq., 358.

But where the devise was to children for life, and then to "their issue and heirs forever," the children took only a *life* estate.

McIntyre vs. McIntyre, 16 S. C., 290.

6. The foregoing decisions were made prior to the Act of 1853. General Statutes, Section 1862. Since then, *it seems* that a bequest or devise to one *and his issue* would be equally affected by the words following, "should he die without issue," *as* by the words, should he die without *leaving* issue, or without issue *living at his death*, and so qualified as to allow "his issue" to take as purchasers, because the first set of words under that Act have the same signification as the last two sets.

Simons vs. Bryce, 10 S. C., 365.
Blum vs. Evans, 10 S. C., 79.

The said Act removes all difficulty as to the general words, "die without issue," and equivalent terms, and applies alike to both deeds and wills.

Bowman vs. Lobe, 14 Rich. Eq., 275.

IV. SURVIVOR.

1. It is established doctrine that wherever the gift takes effect in possession immediately upon death of testator, words of *survivorship* refer to the *date of testator's death*, and are intended to provide for the contingency of the deaths of the

objects of his bounty *in his life time*, unless some other point be indicated by will.

Pressley vs. Davis, 7 Rich. Eq., 107.
Ballard vs. Connors, 10 Rich. Eq., 392.
Reams vs. Spann, 28 S. C., 530.

2. But if a future period for division is fixed, or the enjoyment be postponed by the interposition of a particular interest, as a life estate, the words of survivorship refer to the period of division and enjoyment.

Schoppert vs. Gillam, 6 Rich. Eq., 83.
Pressley vs. Davis, 7 Rich. Eq., 107.
Ballard vs. Connors, 10 Rich. Eq., 392.
Anderson vs. Smoot, Speers Eq., 320.
Roundtree vs. Roundtree, 26 S. C., 464-9.

And where to the words of survivorship are added the terms, "or the heirs of their bodies," both those who did survive and the heirs of the bodies of those who did not survive the life tenant, take at his death.

Anderson vs. Smoot, Speers Eq., 320.

3. *Remainder* of the children not equivalent to *survivors* of the children, but only means the *rest*, the *others* of the children.

Pressley vs. Davis, 7 Rich. Eq., 107.

4. The word *other* is not to be construed as *survivor*.

Cox vs. Buck, 5 Rich. L., 607.

5. If the gift be to persons *alive* at the time of the execution of the will and *certain in number*, they take in severalty as individuals, as fully as if such persons be named individually; they do *not* take as *a class* with the right of survivorship.

Boykin vs. Boykin, 21 S. C., 528.
Dickson vs. Dickson, 23 S. C., 224.

6. There may be survivorship by *implication*, but it must be a plain and, indeed, a necessary implication.

Taveau and Wife vs. Ball, 1 McC. Ch., 6.

7. "A testator may make it one of the conditions of the limitation that the remainderman shall *survive* the first taker, but when he fails to do this and places the remainder upon some other event or contingency, wholly disconnected from the *survivorship* of the remainderman, the facts of his non-survivor-

ship will not defeat the remainder, for the obvious reason that the testator has not so declared and directed."

McMeekin vs. Brummett, 2 Hill Ch., 638.
Pritchett vs. Cannon, 10 Rich. Eq., 394.
Dickson vs. Dickson, 23 S. C., 225.

See PHRASES, DYING WITHOUT ISSUE, ETC.

V. HEIRS OF THE BODY.

1. These words, used in a will or deed, must have *one of two meanings: either* the indefinite lineal succession of heirs of the body, *or* the particular individuals who at a given time answer the description of issue, *i. e., children or other descendants.* The former is the *natural and obvious technical import*, and they will be *so* understood, unless there is something to give them a different meaning. But they will admit of the *latter* meaning. They are construed as words of *limitation* or of *purchase*, as may best affect *the intention.*

Ferril vs. Talbot & Henry, Riley Eq., 246.
Henry vs. Archer, Bail. Eq., 536.
Cox vs. Buck, 5 Rich. L., 605.
Field vs. Watson, 23 S. C., 46.
McCown vs. King, 23 S. C., 236.

2. Where these words are used, "as words *of limitation*, defining the *quantity* of an estate, they always follow, and are attached to terms granting an estate to the ancestor—as where an estate is given to one *and the heirs of his body*, and are thus used only to point out how much and what quantity of the fee has been given to the grantee. So, under the rule in Shelley's case, where an estate is given to one for life, then *to the heirs of his body*, these words have been held to enlarge the life estate to a *fee conditional*, being regarded as words of *limitation* instead of *purchase.*" But where they are *not attached* to the grant of a previous estate, the quantity of which is to be ascertained, there is nothing for them to operate upon, and it *cannot be said* that in such case they were used as words *of limitation.*

McCown vs. King, 23 S. C., 236.

So, when these words were qualified by the words added:

"and their heirs and assigns forever," these words, "heirs of the body," were then words of purchase, and all who answered that description at death of ancestor were entitled to take *as purchasers per capita*, and *not per stirpes;* because the intention was clear that the "heirs of the body" should constitute a *new stock of inheritance*, and *not* take by *descent.*

Dott vs. Wilson, 1 Bay, 457.

Lemacks vs. Glover, 1 Rich. Eq., 143.

Myers vs. Anderson, 1 Strob. Eq., 344.

Though these cases seem to be modified by the case of Danner vs. Trescot, 5 Rich. Eq., 358, as to *realty.*

So, also, where the gift is to a child and the "heirs of her body," and in case such child should die without lawful heirs of her body, then over to surviving children, the "heirs of the body" living at the time of her death, take *as purchasers.*

Nix vs. Ray, 5 Rich., 425.

But when such limitation over was upon *unqualified failure* of issue or heirs of the body, it was void, and whole estate vested in the first taker.

Crow vs. Bell, 2 Brev., 547.

Waller vs. Ward, 2 Spear L., 60.

Barksdale vs. Gamage, 3 Rich. Eq., 276.

So, again, where the gift is in trust for the sole use of a feme covert, and at her death to "the heirs of her body," the legal estate passed through trustee to them, as purchasers; and those *then living* took *per capita*, and not *per stirpes.*

Austin vs. Payne, 8 Rich. Eq., 11.

Kerngood vs. Davis, 21 S. C., 206.

See FEES CONDITIONAL.

MISCELLANEOUS CASES.

1. Acts of 1824 and 1853:

The former simply declares a rule of construction and applies as well to wills taking effect before, and to those taking effect after its passage.

McElwee vs. Wheeler, 10 S. C., 392.

Graham vs. Moore, 13 S. C., 118.

While the latter applies only to instruments taking effect after its passage.

Curry vs. Sims, 11 Rich. L., 490.
Simons vs. Bryce, 10 S. C., 365.
Graham vs. Moore, 13 S. C., 118.

2. As to children:

Children not synonymous with *heirs or issue.*

Smith vs. Smith, 24 S. C., 314.

After-born children cannot take under deed of *personalty,* though included with children living, the *possession being delivered* to those in esse.

Hall vs. Thomas, 3 Strob. L., 104.

But they can take under deed of *real estate,* delivered to *children in esse,* when included with them.

Mellichamp vs. Mellichamp, 28 S. C., 130.

3. As to classes:

Cloud vs. Calhoun, 10 Rich. Eq., 362.
Kerngood vs. Davis, 21 S. C., 206.
Hayne vs. Irvine, 25 S. C., 292.

4. As to estates:

Conditions.

Bedon vs. Bedon, 2 Bail. L., 247.
Smith vs. Hilliard, 2 Strob. Eq., 222.
O'Dom vs. Davis, 7 Rich. L., 540.

Contingencies.

Powell vs. Brown, 1 Bail. L., 100.
Bostick vs. Lawton, 1 Spears L., 240.
Smith vs. Hilliard, 2 Strob. Eq., 222.
Witsell vs. Mitchell, 3 Rich. L., 289.
Perry vs. Logan, 5 Rich. Eq., 202.
Hill vs. Thomas, 11 S. C., 356.

Fee simple.

Bratton vs. Massey, 15 S. C., 281.
Canedy vs. Jones, 19 S. C., 300.

For life.

Witherspoon vs. Dunlap, 1 McC. L., 546.
Hays vs. Hays, 5 Rich. L., 38.
Brooks vs. Brooks, 12 S. C., 443.
McCreary vs. Burns, 17 S. C., 50.

Reservation of same allowed in fee simple conveyance.

Cribb vs. Rogers, 12 S. C., 564.

Powers.

Moody vs. Tedder, 16 S. C., 561.

Remainders.

Johnson vs. Johnson, McM. Eq., 347.

Cross remainders.

Seabrook vs. Mikell, Chev. Eq., 80.

Williams vs. Kibler, 10 S. C., 429.

Boykin vs. Boykin, 21 S. C., 513.

Reversion.

Lenoir vs. Sylvester, 1 Bail. L., 643.

Trusts.

Creighton vs. Clifford, 6 S. C., 188.

Rowland vs. Rowland, 29 S. C., 58.

Howze vs. Barber, 29 S. C., 471.

5. As to heirs:

Cloud vs. Calhoun, 10 Rich. Eq., 362.

Hayne vs. Irvine, 25 S. C., 292.

Necessary to carry fee simple in deed.

Hall vs. Goodwyn, 2 N. & McC., 385.

6. "Issue male" defined.

Beckham vs. DeSaussure, 9 Rich. L., 531.

7. Legal representatives.

Gourdin vs. Shrewsberry, 11 S. C., 1.

8. Parties to actions—contingent remaindermen.

Thomas vs. Poole, 19 S. C., 336.

Leroy vs. Charleston, 20 S. C., 76.

Mosely vs. Hankinson, 22 S. C., 328.

Farr vs. Gilreath, 23 S. C,, 513.

9. Proceeds of realty is personalty.

Andrews vs. Loeb, 22 S. C., 275.

Farr vs. Gilreath, 23 S. C., 513.

Bell vs. Bell, 25 S. C., 153.

10. Wills:

Limitations in one part do not attach to provisions in another part.

Dunlap vs. Garlington, 17 S. C., 572.

Tompkins vs. Tompkins, 18 S. C., 95.

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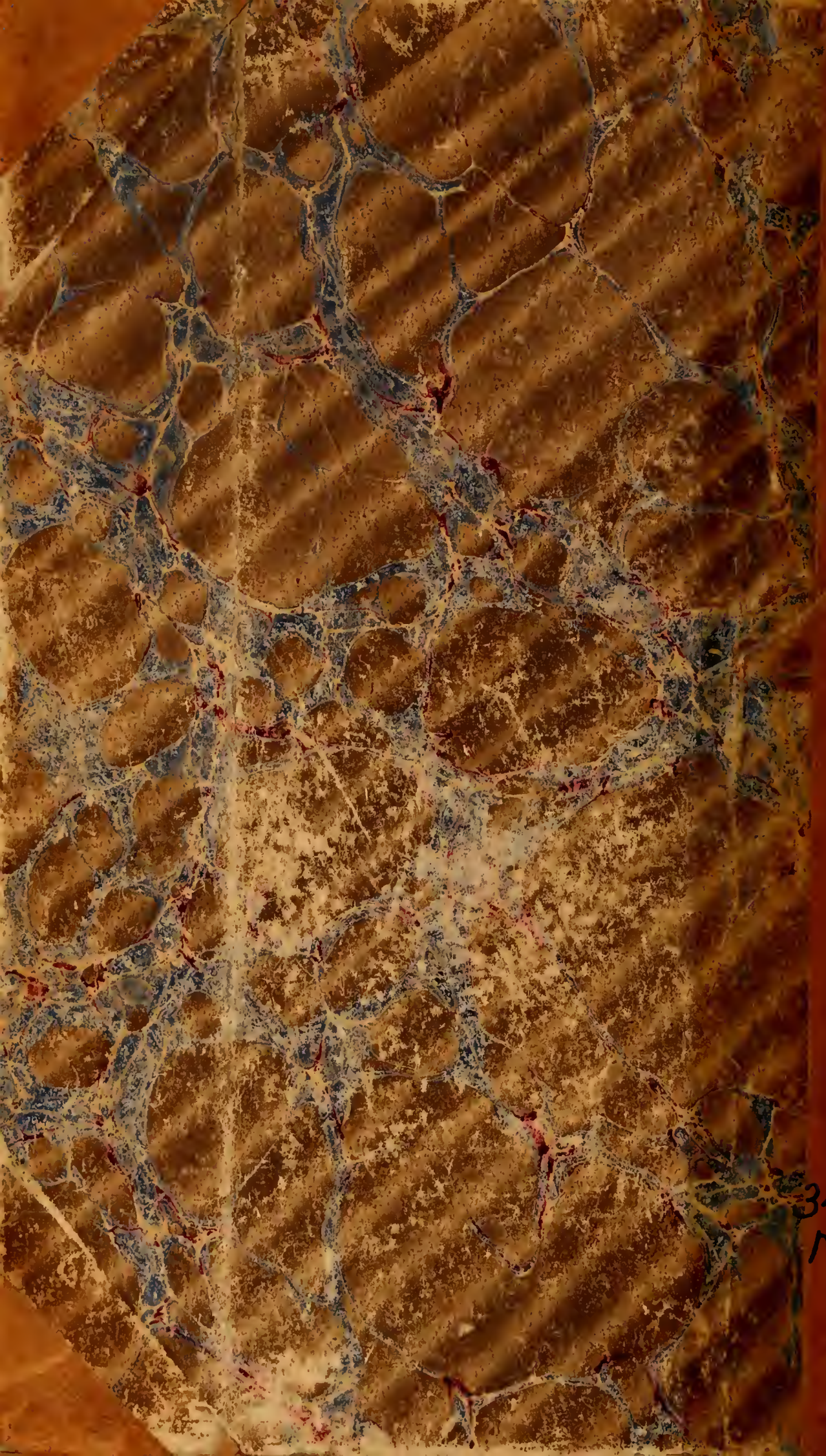

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